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No. 98-184

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

THE STATE OF WYOMING,
Petitioner,

v.

SANDRA HOUGHTON,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WYOMING

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When the circumstances that create probable cause to search an automobile do not provide probable cause with respect to a passenger's purse, does the automobile exception to the warrant requirement nevertheless authorize a search of the purse?

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to ensure the proper and fair administration of justice, and the continued recognition and adherence to the Bill of Rights which is necessary to sustain the quality of the American system of justice.

STATEMENT OF THE CASE

On July 23, 1995, Officer Delane Baldwin stopped an automobile driven by David Young. According to Officer Baldwin, the automobile was speeding and a brake light was faulty. Respondent Sandra Houghton was a passenger in Young's car. As tens of millions of American women do

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[1] This *amicus curiae* brief is submitted in support of the Respondent, Sandra Houghton. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief. As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party other than counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel have made a monetary contribution to the preparation or submission of this brief.

every day, Houghton had taken her purse with her. J.A. 135-37.

After approaching the vehicle, Officer Baldwin noticed a syringe in Young's shirt pocket and questioned Young about it. According to Officer Baldwin, Young said that he used the syringe to take drugs. Officer Baldwin then ordered the occupants out of the vehicle, patted them down, and proceeded to search the car. He discovered a closed "cloth lady's purse." J.A. 19, 143; Pet. App. 4.

Officer Baldwin knew the purse belonged to Ms. Houghton. Ms. Houghton told him so, and the first item that the officer discovered in the purse was her identification. Officer Baldwin also knew that men generally do not carry purses. J.A. 18-21.

Furthermore, the officer did not testify that he observed any furtive movements by Houghton, or any movements by Young indicating that he was depositing drugs into Houghton's purse. To the contrary, the occupants of the car were constantly under police observation and there were no suspicious movements within the car. *See* Pet. App. 18.

Thus, as the officer admitted, there was no probable cause with respect to Ms. Houghton or her purse. J.A. 19. Nonetheless, the officer opened the purse, and found two wallets. Still without probable cause to believe that Ms. Houghton's purse contained drugs, he opened and searched the wallets. Officer Baldwin found illegal drugs and arrested Ms. Houghton. J.A. 19, 21.

Prior to trial, Ms. Houghton moved to suppress the evidence on the basis that the search violated the Fourth Amendment. The district judge denied the motion. On appeal from Ms. Houghton's conviction, the Wyoming Supreme Court reversed, concluding that the search was unconstitutional. The court stated that it could not agree that "the automobile exception removes from judicial review *all* searches of *all* containers physically capable of containing the object of the search. To so rule would provide a wholesale surrender of Fourth Amendment protection upon entering an automobile." Pet. App. 21 (emphasis added).

SUMMARY OF THE ARGUMENT

This case is about probable cause, and this Court's cases defining the nature and quantum of evidence that comprise probable cause. This case is not about the warrant requirement, or this Court's discussion of the exception to that requirement in the context of automobile searches. With this in mind, this Court should affirm the decision of the Wyoming Supreme Court.

First, there was no probable cause to search Ms. Houghton's purse. It is well settled that probable cause requires individualized suspicion, and it is uncontroverted that Officer Baldwin lacked individualized suspicion with respect to Ms. Houghton or her purse. Insofar as the State suggests that some notion of "general" probable cause sufficed, the State's position must be rejected, for it is inconsistent with the very nature of probable cause. Indeed, the purpose of the Fourth Amendment was to replace the notion of general suspicion with the requirement of individualized suspicion.

Second, the automobile exception to the warrant requirement does not relax the requirements of probable cause. The automobile exception removes the need for a warrant for automobile searches, but does not dilute the level of suspicion required for probable cause. The requirements necessary to establish probable cause during an automobile search are the same as those required for probable cause in all other contexts. The State's attempt to distinguish the seminal probable cause decisions of this Court on the ground that they do not involve automobile searches is, therefore, unavailing. In addition, the State's assertion that searches of passenger's belongings are controlled by the statements about containers in *Ross* and *Acevedo* is untenable. Those cases did not address passengers or their belongings, and certainly did not hold that a passenger's purse could be searched simply because the driver was suspected of using drugs. Such a holding would not only create a warrant exception in automobile search cases, but a probable cause exception as well.

Third, contrary to the State's arguments, the circumstances of automobile searches do not justify a retreat from the requirements of probable cause. The State suggests that absent any specific and individualized suspicion, it is reasonable to assume that drivers and passengers are engaged in the same activities merely because they are riding together in a car. This suggestion, however, is bare conjecture. The State also argues that requiring officers to distinguish between passengers' items and drivers' items is unworkable. But Officer Baldwin had no problem making this distinction; he testified that he knew that the purse belonged to Ms. Houghton. Indeed, police officers make probable cause determinations every day of the week in a variety of contexts. Finally, the State argues that affirming the decision of the Supreme Court of Wyoming would create

an anomaly because the decision would be inconsistent with the rule concerning searches incident to arrest set forth in *New York v. Belton*, 453 U.S. 454 (1981). But pre-arrest automobile searches and searches incident to arrest implicate different considerations and thus call for different rules. In any event, the State's position would create an unjustified anomaly concerning the rules governing searches of an automobile passenger and those governing searches of a passenger's belongings.

ARGUMENT

POLICE OFFICERS SHOULD BE NOT PERMITTED TO SEARCH A PASSENGER'S BELONGINGS WITHOUT PROBABLE CAUSE SPECIFIC TO THE PASSENGER OR HER BELONGINGS.

The search of Sandra Houghton's purse was conducted without probable cause to believe that the purse contained contraband or evidence of a crime, and therefore did not satisfy the requirement that probable cause be based on specific and individualized suspicion. The State admits as much, *see, e.g.*, Petitioner's Brief ("Pet. Br.") at i ("police . . . have no probable cause specific to [Houghton's] purse or [Houghton]"), and is left to argue that probable cause is different when applied to an automobile. *See* Pet. Br. at 20. It contends that under the automobile exception, probable cause specific to a passenger's belongings is not necessary when there is probable cause to search the car generally. *See* Pet. Br. at 23. This proposition—that the specific and individualized suspicion requirement of probable cause is relaxed in the context of a car—is contrary to this Court's cases explaining the probable cause requirement and the automobile exception to the warrant requirement.

A. PROBABLE CAUSE MUST BE SPECIFIC AND INDIVIDUALIZED.

The Fourth Amendment's "individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself." *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 678 (1995) (O'Connor, J., dissenting). Indeed, the Framers's insistence on the requirement of specific and individualized suspicion grew out of *suspicionless* searches permitted by general warrants and writs of assistance in England and early America. *See* Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 938 (1997); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483, 528 (1995) (describing the "core complaint" of the colonists as the general, baseless searches that were executed without "individualized suspicion"). Such warrants and writs "were not issued as a result of any information that contraband was stored at a specific place; instead, the customs officials could search wherever they chose." *Id.* at 500.

The colonists' dissatisfaction with general warrants and writs of assistance, and their concomitant drive to replace general suspicionless searches with specific and individualized searches, grew in part out of the 18th century corollary of the car—the boat. *See* Maclin, 77 B.U. L. Rev. at 962. On the eve of the American Revolution, British agents, without probable cause, searched and seized ships belonging to Henry Laurens and John Hancock. Both Laurens and Hancock organized loud and effective political protests concerning the general searches of their vessels. *Id.* The result of these and similar protests was not only the

Fourth Amendment, but also the Collection Act of July 31, 1789, which required individualized suspicion before the search of a vessel. *See Vernonia Sch. Dist.*, 515 U.S. at 671 (O'Connor, J., dissenting) (describing the Collection Act of 1789 as the most significant of all early search statutes, "'for it identified the techniques of search and seizure that the framers of the amendment believed reasonable while they were framing it'" (quoting W. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 1490-91 (1990) (Ph.D. Dissertation at Claremont Graduate School)).

For the last 200 years, this Court has remained faithful to the idea that a reasonable search requires specific and individualized probable cause. Today, probable cause requires a finding that, under the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Phrased differently, it requires "known facts and circumstances . . . sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

Accordingly, a finding of probable cause requires individualized suspicion based on facts and circumstances specific to the object or person to be searched. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("Where the standard is probable cause, a search . . . of a person must be supported by probable cause particularized with respect to that person."); *Sibron v. New York*, 392 U.S. 40, 62-63 (1968) (no probable cause to search person talking to narcotics dealers where officer was "completely ignorant" of specific facts and circumstances implicating person); *United States v. Di Re*, 332 U.S. 581, 587 (1948) (person's "mere presence

in a suspected car" does not amount to probable cause to search that person). *See also Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 624 (1989) ("search[es], . . ., as a general matter," require "individualized suspicion"); *Brown v. Texas*, 443 U.S. 47, 52 (1979) ("The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct."); *Vernonia Sch. Dist.*, 515 U.S. at 667 (O'Connor, J., dissenting) (discussing "requirement of individualized suspicion"); *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 680-81, 684 (1989) (Scalia, J., dissenting) ("individualized" or "particularized" suspicion is necessary component of reasonable search and seizure absent some "demonstrated" "social necessity"). *See also Terry v. Ohio,* 392 U.S. 1, 21 n.18 (1968) ("Th[e] demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence.").

Specificity and "individualized suspicion" are such essential components of a reasonable search that they are ordinarily required even when probable cause is not, in the context of lesser intrusions that require only "reasonable suspicion." *See, e.g., Skinner,* 489 U.S. at 624 (Even "[w]hen the balance of interests precludes insistence on a showing of probable cause, we have usually required 'some quantum of individualized suspicion' before concluding that a search is reasonable.") (quotation omitted); *United States v. Cortez*, 449 U.S. 411, 418 (1981) (investigative stop of a vehicle must be supported by the "suspicion that the particular individual being stopped is engaged in wrongdoing"). These cases underscore the principle that probable cause must be specific and individualized.

Three decisions of this Court—*Di Re*, *Sibron* and *Ybarra*—explore the specific and individualized nature of probable cause. In *Di Re*, police approached a car on the basis of a tip from an informant that the driver of the car was selling counterfeit gasoline coupons. 332 U.S. at 583. The Court assumed, without deciding, that probable cause existed to search the car. *Id.* at 586. But the police went further, and searched Michael Di Re, a passenger in the car, even though none of the information supplied by the informant implicated him. *Id.* at 583. "All [the police] had was his presence." *Id.* at 592. The Court characterized the government's attempt to base probable cause on Di Re's "mere presence" in the car as "farfetched," and held that "mere presence" was insufficient to establish probable cause. *Id.* at 592-94. The Court concluded that "a person, by mere presence in a suspected car, [does not] lose[] immunities from search of his person to which he would otherwise be entitled." *Id.* at 587.

In *Sibron*, police conducted a search of the defendant after observing him talk to known narcotics addicts over an eight hour period. 392 U.S. at 40. In concluding that these facts did not justify a search, the Court emphasized that the officer "had no information concerning [Sibron]." *Id.* at 62. "The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." *Id.*; *see also id.* at 73 ("There must be something . . . in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current, or intended.") (Harlan, J., concurring).

The third case, *Ybarra*, involved a warrant to search a tavern and its bartender for heroin. 444 U.S. at 85. The

warrant was issued based on information indicating that the bartender was selling heroin. *Id.* at 88. Upon executing the warrant, the police not only searched the premises and the bartender, but also each customer, including the defendant Ventura Ybarra. The police "knew nothing in particular about Ybarra," the Court noted, "except that he was present . . . in a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale." *Id.* at 91. This was not enough to establish probable cause to search Ybarra. "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause" because of the absence of "particularized" suspicion. *Id.* The Court stressed that "Ybarra made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officers." *Id.* at 93.

Based on these cases, the conclusion that officer Baldwin lacked probable cause to search Ms. Houghton's purse is easy and uncontroversial. The mere fact that the driver of the automobile in which Sandra Houghton was riding was a drug user did not support any *individualized* suspicion with respect to Ms. Houghton or her purse. Under *Ybarra*, a person's "mere propinquity to others independently suspected of criminal activity" does not authorize an officer to conduct a search of that person. Therefore, Ms. Houghton's presence in David Young's car did not authorize Officer Baldwin to search her belongings.

The State and its *amici* attempt to distinguish these cases[2] on grounds previously deemed insignificant by this Court. First, they argue that *Di Re* and *Ybarra* involved searches of people as opposed to searches of objects. *See, e.g.*, Brief for the United States as *Amicus Curiae* Supporting Petitioner ("U.S. Br.") at 18-19. Probable cause, however, is required to search citizens *and* their effects. *See Payton v. New York*, 445 U.S. 573, 586-87 (1980) ("[I]t is . . . well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant . . . *assuming that there is probable cause to associate the property with criminal activity.*" (emphasis added)); *Henry v. United States*, 361 U.S. 98, 104 (1959) ("The police must have reasonable grounds to believe that the *particular package* carried by the citizen is contraband." (emphasis added)); *see also Arizona v. Hicks*, 480 U.S. 321, 326-28 (1987) (holding that search of stereo equipment required probable cause to believe that equipment was stolen and noting that the Court has never drawn "categorical distinction[s]" between different types of searches and seizures when discussing "degree of justification needed to establish the reasonableness of police action"). The State fails to provide a principled explanation as to why personal belongings should be treated differently than passengers.[3]

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[2] The State does not cite or discuss *Di Re*. Accordingly, this brief addresses the arguments concerning *Di Re* advanced by the *amici* supporting the State.

[3] This is not to say that an individual must be suspected of wrongdoing before her belongings can be searched, but rather that there must be specific and individualized suspicion that the belongings contain contraband or evidence of a crime. Thus, cites to *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), do not help the State. The State cites *Zurcher* for the proposition that a search may be conducted even where there is not probable cause that the person being searched has done anything wrong. The search in *Zurcher*, however, was based on probable

Then, without regard to *Di Re*, an automobile case explaining probable cause exactly the same way as the *Ybarra* Court did, the State argues that *Ybarra* does not apply because the search in that case did not occur in an automobile. *See* Pet. Br. at 20, 25. The *Ybarra* Court, however, explicitly relied on *Di Re*, and explained that "the governing principle in both cases is basically the same." 444 U.S. at 95. The concerns of the colonists about overbroad searches were not limited to searches about stationary premises, as the protests of British searches of ships demonstrate. As fully described in the next section, the requirements for probable cause are the same regardless of whether a search is conducted in a car or on fixed premises.

B. THE COURT'S AUTOMOBILE SEARCH CASES HAVE NOT CHANGED THE REQUIREMENT THAT PROBABLE CAUSE BE SPECIFIC AND INDIVIDUALIZED.

The State contends that, under the automobile exception, probable cause specific to a passenger's belongings is not necessary to search those belongings. *See* Pet. Br. at 23 ("given existence of probable cause to search the vehicle *generally*, an additional measure of probable cause should not be required" (emphasis added)). In effect,

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cause to believe that evidence of a crime was located at a student newspaper office. *Id.* at 550. In this case, however, there was no cause to think that Houghton's purse contained evidence of a crime or contraband. If the officers in this case had reason to think that Houghton's purse contained evidence of a crime or contraband (whether put there by Houghton herself or by the driver), they would have been permitted to search it. As the State concedes, however, there was no probable cause specific to the purse.

the State is arguing that the automobile exception not only removes the need for a warrant, but also changes the contours of probable cause by removing the requirement of specific and individualized suspicion. Despite the State's urging, however, this requirement applies to automobile searches.

1. The nature of the automobile exception.

The State mischaracterizes the automobile exception. The exception, as delineated by *Carroll v. United States*, 267 U.S. 132 (1925), and its progeny, only concerns the need for a warrant. It does not alter the probable cause requirements for a search. "[The *Carroll*] decision merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause." *Henry*, 361 U.S. at 104.

Carroll was clear on this point. "[C]ontraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant" only if "there is known to a competent official authorized to search, *probable cause* for believing that their vehicles are carrying contraband or illegal merchandise." *Carroll*, 267 U.S. at 153-54 (emphasis added); *see also Chambers v. Maroney*, 399 U.S. 42, 51 (1970) ("In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution."). As this Court observed in *Arizona v. Hicks*, 480 U.S. 321, 327 (1987), "[d]ispensing with the need for a warrant is worlds apart from permitting a lesser standard of cause for the seizure than a warrant would require."

Indeed, in *Di Re*, a case which the State neglects to cite, the Court addressed, and rejected, the proposition now advanced by the State—that the automobile exception reduces the level of suspicion required for probable cause. There, the government argued that, even in the absence of probable cause to search Di Re, who was a passenger in a vehicle that the police had probable cause to search, "the search of his person was justified as *incident* to [the] search of a vehicle." *Di Re*, 332 U.S. at 583-84, 586 (emphasis added). The Court unequivocally rejected that argument. "We see no ground for expanding the ruling in the *Carroll* case to justify this arrest and search as incident to the search of a car. We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." *Id.* at 587.

And in *Ybarra*, the Court explicitly recognized that probable cause is the same both inside and outside of an automobile. 444 U.S. at 95. The authorities are therefore clear that the automobile exception does not relax the requirements of probable cause, and that the principles of probable cause set forth in cases such as *Ybarra* and *Sibron* apply to automobile searches.

2. *Ross* and *Acevedo*.

The State's submission that the belongings of an automobile passenger may be searched without probable cause is not supported by either *United States v. Ross*, 456 U.S. 798 (1982), or *California v. Acevedo*, 500 U.S. 565 (1991). Those cases expand only the automobile exception to the warrant requirement and in no way relax the probable

cause requirement. Moreover, unlike *Di Re*, they did not involve the search of a passenger or her purse.

In *Ross*, the police searched Ross's car without a warrant after an informant told the police that he had seen Ross complete a drug transaction using drugs stored in the trunk of Ross's car. The police searched the car's trunk, finding a paper bag. Upon opening the bag, the police found drugs.

Upholding the constitutionality of the search, the Court held that "[t]he scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause." 456 U.S. at 823. Because a warrant would have authorized the search of the bag, the Court found the search reasonable. The Court concluded that the scope of a warrantless search of an automobile is "defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Id.* at 824. *See also Acevedo*, 500 U.S. at 570 (describing *Ross* as allowing "a search of a container or package found inside the car when such a search was supported by probable cause"). The *Ross* Court thus made clear that it was not authorizing the search of "every container." 456 U.S. at 822-23.

Nevertheless, the State appears to assume that *Ross* somehow adopted a diluted version of the probable cause requirement. The Court, however, did not say it was doing so, nor analyze whether such a dilution is justified, as the Court certainly would have done had it intended to alter the longstanding requirement of probable cause. The State points only to a single sentence of *Ross*: "'If probable cause justifies the search of a lawfully stopped vehicle, it justifies

the search of every part of the vehicle and its contents that may conceal the object of the search.'" Pet. Br. at 16-17 (*quoting Ross*, 456 U.S. at 825). The State's interpretation cannot withstand scrutiny.

First, the State ignores the preceding sentence: "We hold that the scope of the warrantless search authorized by that exception is no broader and no narrower than a magistrate could legitimately authorize by warrant." *Ross*, 456 U.S. at 825. The import of the passage in its entirety is to equate the scope of a warrantless search under the automobile exception with the scope of a search that a warrant could legitimately authorize, and there is no question that a magistrate's issuance of a warrant is fully subject to the requirement of probable cause. *See* U.S. Const. amend. IV ("no Warrants shall issue, but upon probable cause").

Second, the Court gave specific examples demonstrating that it did not authorize the search of *every* container: "Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase." *Ross*, 456 U.S. at 824. The Court added that "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." *Id.* These examples refute the notion that *Ross* automatically authorizes a search of each and every container in a vehicle once there is probable cause to search the vehicle.

Third, the *Ross* Court did not address the situation in which the police know, prior to searching a container found

in a car, that it belongs to a passenger whose person and belongings are not implicated by the circumstances giving rise to probable cause to search the car. The *Ross* Court was addressing the typical search of a container in a car, and undoubtedly the existence of probable cause to search a car ordinarily means that there is probable cause to search any container large enough to contain the object of the search. But the situation is different when the police are on notice that the container belongs to a passenger whose person and belongings are not implicated by the circumstances giving rise to probable cause. As Professor Lafave explains, "it is sometimes possible that there will not be probable cause [that] the object sought could be in a certain container within the car, even though the object would fit within that container and even though there is probable cause that the object is somewhere within that vehicle." 3 Wayne R. LaFave, *Search and Seizure* § 7.2(c), at 488 n.113 (3d ed. 1996). The search of Sandra Houghton's purse is that case.

The State's reading of *Ross* would lead to intolerable results. Suppose, for instance, the police stop a taxicab occupied by a lawyer on the way to court. According to the State's argument, if the officer spied a syringe in the driver's pocket, the police could search a lawyer's briefcase even though the lawyer had no relationship to the driver and had done nothing suspicious.

Indeed, the rule proffered by the State would have its greatest impact on those persons who do not drive—including low-income persons who cannot afford the cost of their own automobile—and rely on others for transportation. There are many people in this country who lack the means to travel to a concert, ballgame, or political protest other than in a vehicle shared by several other occupants. In the State's

view, such individuals would essentially forfeit their Fourth Amendment rights every time they step into an automobile driven by another person.

But even if the State were correct, and *Ross* were read to permit suspicionless searches of all containers (including those belonging to passengers), nothing in *Ross* suggests that a purse constitutes such a "container." *See, e.g.*, *Ross*, 456 U.S. at 822 (giving as examples of containers "paper bags, locked trunks, lunch buckets, and orange crates"). Women typically carry purses on their persons or keep them in very close proximity. As noted by one of the *amici* supporting the State, "[t]he Court can take judicial notice that in American society women almost always keep their purses (or pocketbooks) on them, usually on their shoulders, in their hands, or between their arms . . . ." Brief of *Amicus Curiae* National Association of Police Organizations in Support of Petitioner at 10 n.3. A search of a purse bears a closer resemblance to a search of a person's clothing than it does to a search of the kinds of articles the *Ross* Court gave as examples of "containers."

There are good reasons to treat a search of a purse as a search of the person rather than as a search of a container. Not only do women typically keep their purses on them, but purses to a considerable extent serve the same function as pockets in clothing, and they contain highly personal items. *See New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) ("students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries"); *United States v. Welch*, 4 F.3d 761, 764 (9th Cir. 1993) ("a purse is a type of container in which a person possesses the highest expectations of privacy"). It is difficult to understand why the contents of a woman's purse

should receive less protection than the contents of a man's (or a woman's) pants pockets.

If Houghton had been carrying the contents of her purse in pockets in her clothing, those materials clearly could not have been searched, since the police lacked probable cause specific to Houghton. *See Di Re*, 332 U.S. at 585. The result should not be different merely because Houghton chose to keep items in her purse instead of in her pockets.

The State's reliance on *California v. Acevedo*, 500 U.S. 565 (1991), is similarly misplaced. That case did not involve a situation where the police lacked probable cause specific to the container that they searched. To the contrary, the issue was whether police may conduct a warrantless search of a container in the trunk of a car where they have probable cause specific to the container, but not with respect to the rest of the car. *Id.* at 567. The Court authorized a warrantless search of the particular container, but it made clear that the police could not search the remainder of the car for which there was no probable cause. *Acevedo*, therefore, is fully consistent with the principle that probable cause requires specific and individualized suspicion.

The Court's cases applying the automobile exception to the warrant requirement have been remarkably consistent: probable cause is always required. Because the Wyoming officers could not point to one objective fact to indicate that Sandra Houghton possessed drugs or that someone had placed drugs in her purse, the officer should not have rummaged through her purse. The Court should not stray from the principle explained in its automobile cases—that searches must be supported by probable cause—or from the principle explained in its probable cause cases—that specific and individualized suspicion is required before conducting a

search. Accordingly, the Court should affirm the Wyoming Supreme Court's holding that the search of Sandra Houghton's purse without probable cause violates the Fourth Amendment.

C. IT IS REASONABLE TO MAINTAIN THE REQUIREMENTS OF PROBABLE CAUSE IN THE CONTEXT OF AUTOMOBILE SEARCHES.

The State and its *amici* seem to suggest that even if probable cause is not present, other considerations militate in favor of searching Ms. Houghton's purse. They argue that specific and individualized suspicion is not necessary to search a passenger's belongings because (1) when there is a reason to believe a driver is involved in illegal activity, it is reasonable to assume that the passenger is engaged in the same illegal activity; (2) it is unworkable to require officers to make probable cause determinations with respect to passengers' belongings; and (3) requiring probable cause to search a passenger's belongings would create an anomaly in the case law governing automobile searches. Each of these arguments is without merit.

1. The State and its *amici* claim that it is reasonable to assume that a passenger's belongings may contain evidence of criminal activity when there are grounds to suspect a driver of committing a crime. They say that drivers and passengers are likely to be engaged in a common purpose and, therefore, a passenger is likely to be engaging in the same illegal activity as the driver. *See, e.g.*, Pet. Br. at 31 (stating that it is "obvious[]" that drivers and passengers have a "common purpose"); U.S. Br. at 12 ("[i]t is not unreasonable to *assume* that [drivers and passengers] *may*

. . . be engaged in other common activity associated with . . . travel" (emphasis added)). Similarly, they suggest that it is reasonable to *assume* that the driver's contraband *may* be concealed in the passenger's belongings. *See* U.S. Br. at 6 ("it is reasonable to assume that a passenger's purse, bag or other container . . . is as likely a receptacle as any other compartment or container in the automobile"). In effect, the State and Solicitor General attempt to revive the argument that "mere presence" gives rise to probable cause.

But the State's underlying assumptions are far from reasonable. The State and its *amici* fail to point to any evidence or statistics of any sort supporting the notions that drivers and passengers share a "common purpose," or that drivers are likely to conceal contraband in the belongings of their passengers. Such notions are no more than generalizations which are insufficient to justify a departure from the requirement of specific and individualized suspicion. *See Ybarra,* 444 U.S. at 91; *Di Re,* 332 U.S. at 587; *Von Raab*, 489 U.S. at 684 (Scalia, J., dissenting) (mere "generalization[s]" should not be permitted to influence this Court's Fourth Amendment jurisprudence).

As discussed above, this Court has previously rejected similar assumptions as "farfetched." *Di Re,* 332 U.S. at 593. *See also Ybarra,* 444 U.S. at 91; *Sibron*, 392 U.S. at 62. And rightly so. For example, suppose that we knew that David Young was a fan of the Washington Redskins football team. Even the State must agree that no assumptions can be made regarding Houghton's allegiance to the Redskins. She might be a fan of the Dallas Cowboys and detest the Redskins, notwithstanding the fact that she is riding in the car with Young. Similarly, information indicating that Young is a drug user does not indicate that the

passengers in the car are drug users. Permitting this type of inference does away with the specific and individualized suspicion requirement of the Fourth Amendment.

2. The State also contends that the probable cause requirement is unworkable in the context of automobile container searches. Not only are officers perfectly capable of making probable cause determinations before conducting searches, but they do so each and every day. Thus, the State's contention that requiring officers to search only upon probable cause is unworkable is faulty. This case is a perfect illustration. Here, the officer *knew* that the purse was Houghton's, and had no reason to think that she possessed drugs in her purse, or that Young put drugs there. What, then, is unworkable about prohibiting this search, or others like it, where probable cause is lacking?

"On the spot" determinations are part and parcel of being a police officer. The police make probable cause determinations routinely and in a variety of situations—including when they search or seize an item in "plain view," *see, e.g., Hicks*, 480 U.S 321, and when they search a specific container in a car, but not the rest of the vehicle, *see, e.g., Acevedo*, 500 U.S. 565. To argue that the very same determination is now "unworkable" in the context of a search of passenger's belongings is not plausible.

Lower courts, which would have to deal with the alleged workability problem, have not found such a problem exists. Numerous cases involving searches on fixed premises have required the police to distinguish between a search of a suspect's belongings, for which probable cause exists, and a search of a visitor's belongings for which there is no probable cause. *See, e.g., United States v. Robertson*, 833 F. 2d 777, 785 (9th Cir. 1987) (search of visitor's

backpack violated Fourth Amendment because government's rationale would permit search of objects "in the absence of any suspicion whatsoever that they contain anything in which the police have a legitimate interest in viewing"); *Hawkins v. Georgia*, 300 S.E.2d 224 (Ga. Ct. App. 1983) (search for drugs could not extend to search of purse of visitor); *Childers v. Georgia*, 281 S.E.2d 349, 351 (Ga. Ct. App. 1981) (search for marijuana could not extend to defendant's purse where there "was no evidence to indicate that [she] was other than a mere visitor"); *Hawaii v. Przeradski*, 677 P.2d 471 (Haw. Ct. App. 1984) (search for evidence of fraudulent investment scheme did not permit search of visitor's beach bag).

It might be *easier* for law enforcement if the probable cause requirement of the Fourth Amendment were abandoned, but the requirement is not *unworkable*. *Cf. Maryland v. Wilson*, 519 U.S. 408, 423-24, (1997) (Kennedy, J., dissenting) ("It does no disservice to police officers . . . to insist upon exercise of reasoned judgment. . . . Liberty comes not from officials by grace but from the Constitution by right."). In any event, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

3. The State and its *amici*, citing to *New York v. Belton*, 453 U.S. 454 (1981), also argue that it would be anomalous if officers were not permitted to search Houghton's purse. This argument is unfounded.

Belton applied the search incident to arrest exception to automobiles, and permitted the search of a person's jacket who had been arrested. It did not involve the search of

bystanders or their things.[4] The *Belton* Court announced an extremely narrow exception to the requirements of an automobile search. The exception, that probable cause is not required for a search of the passenger compartment incident to arrest, was created "because of the need 'to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape' and the need to prevent the concealment or destruction of evidence." *Id.* at 457 (alteration in original) (*quoting Chimel v. California*, 395 U.S. 752, 763 (1969)). Those concerns are triggered by an arrest, not by a search unaccompanied by an arrest. This is so because safety concerns are heightened when an arrest is made. *See id.* at 457. Accordingly, it is not anomalous that *Belton*, a case dealing with the safety concerns present during a search incident to arrest, permits a broader search than do cases involving searches in the absence of an arrest.

Similarly, there is no tension between the Wyoming Supreme Court's decision and *Wilson*, 519 U.S. at 415. There, the Court stated that officers making traffic stops may order passengers to get out of the car pending completion of the stop. *Id.* The safety concerns animating the Court in *Wilson* led to the conclusion that the "additional intrusion on the passenger [of getting out of the car] is minimal." *Id.* at 415. This is so because the passenger is already stopped; therefore, the additional measure of stepping out of the car was deemed a minor intrusion. *Id.* Here, however, there was a significant invasion of Houghton's privacy. In addition to being ordered out of the car, Houghton had her personal belongings searched. Because the additional intrusion here is not "minimal," *Wilson* is not analogous.

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[4] This Court has never extended *Belton* to encompass articles belonging to persons other than the arrestee.

A true anomaly would be created if this Court reversed the decision of the Supreme Court of Wyoming. This Court held in *Di Re* that an officer cannot search a passenger without probable cause specific to the passenger. Why then, should an officer be permitted to search a passenger's purse? Why should there be a difference between the person and her intimate belongings? The underlying rationale of *Di Re* and other seminal probable cause decisions of this Court provides the answers to these questions: searches cannot be conducted of a person or her personal belongings where probable cause specific to the person or the belongings is lacking.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Wyoming should be affirmed.

Respectfully Submitted,

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